IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 126 of 1994

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MANIBEN D/O B PATEL & ORS

Versus

RAMIBEN D/O B.K.PATEL & ORS

MS KJ BRAHMBHATT for the appellant.
MR BS PATEL for Res.No. 1.

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 19/10/2000

20/10/2000

ORAL JUDGEMENT

This appeal under section 100 of CP Code arises of the judgment and order dated 18th April, 1994, passed by the learned District Judge, Valsad, in Regular Civil Appeal No. 26/93, arising of the judgment and order dated 17th December, 1991, passed by the learned Civil Judge (JD) Gandevi, in Regular Civil Suit No. 130/85. The appellants before this court are the plaintiffs. The respondents nos. 9 and 10/1 have, pending this appeal,

died on 24th November, 1997 and 6th December, 1996, respectively. The heirs and legal representatives of the said respondents have not been brought on the record. The appeal against the said respondents has abated. The respondent no. 10/2 had died on 4th June, 1986 pending the suit and his heirs and legal representatives also have not been brought on the records of the matter. The suit against the said respondent-defendant had thus abated.

The plaintiffs and the defendants are the descedants of one common ancestor one Kalabhai Patel. The plaintiff no.1 is the daughter of Bhagubhai Kalabhai and the grand-daughter of said Kalabhai Patel. The plaintiff no. 2 is the daughter of Jivanbhai Kalabhai Patel and the grand-daughter of the said Kalabhai Patel. The plaintiffs claim that the properties referred to in the plaint were the joint family properties of the said common ancestor Kalabhai Patel. Bhagubhai Kalabhai and Jivanbhai Kalabhai the sons of the said Kalabhai Patel had died in the years 1982 and 1979 respectively. The plaintiffs further say that they belong to Hindu Dhodiya community and they are governed by the Hindu Succession Act, 1956 (hereinafter referred to as 'the Act of 1956'). Before that, they were governed by the Hindu Act and by the custom and usage prevalent in their community. The plaintiff no.1 had 1/10th share and the plaintiff no. 2 had 1/12th share in the joint family property. The plaintiffs, therefore, prayed for partition in the suit property by metes and bounds; for possession of their share in the suit property; and for rendition of accounts of the part of the suit properties given on rent. The suit was contested by the defendants nos. 3 and 9 by filing written statement at Ex. 40. The defendants nos. 17 and 18 and 10/1 to 10/6 adopted the written statement Ex.40 by filing written statements at Exs. 41 and 42 respectively. The averments made in the plaint were specifically denied. It was asserted that the plaintiffs and the defendants belong to Hindu Dhodiya community which was declared to be a Scheduled Tribe. The Act of 1856 therefore, was not applicable. The plaintiffs being daughters can not claim share in the joint family property. The defendants nos. 3, 9 and 10 made an application at Ex. 58, and prayed for a decision on the preliminary issues - (a) whether the plaintiffs are barred from obtaining the partition of ancestral property as they belong to Dhodiya caste as per provisions of the Hindu Succession Act; and (b) whether this court has jurisdiction to try the suit which comprises of the property governed by section 73-AA of the Land Revenue

Code. The said application was partly allowed by order dated 12th December, 1990. The suit was directed to be heard on preliminary issue whether the plaintiffs being of Hindu Dhodiya community were barred from claiming reliefs under the Act of 1956. The suit was accordingly heard on the aforesaid preliminary issue. The learned trial Judge held that the community of the plaintiffs was declared to be a Scheduled Tribe and in view of sub-section (2) of section 2 of the Act of 1956, the said Act did not apply to the plaintiffs. It was further held that even after the enactment of the Act of 1956, the plaintiffs continued to be governed by the Hindu Nibandh, 1937 (hereinafter referred to as 'the Nibandh'), prevalent in the erstwhile State of Baroda. It was held that under the Nibandh, the daughters were excluded from the properties of the joint family. The plaintiffs, therefore, could not have claimed a share in the suit properties. The learned trial Judge accordingly dismissed the suit by his judgment and order dated 17th December, 1991. Feeling aggrieved, the plaintiffs preferred Regular Civil Appeal No. 26/93. The same also was dismissed by the learned District Judge, Valsad, on 18th April, 1994. Feeling aggrieved, the plaintiffs have preferred the present appeal.

Ms. Brahmbhatt has contended that both the courts below have grossly erred in dismissing the suit on preliminary issue alone. It was the duty of the trial court to frame the issues based on the pleadings and to decide all the issues on merits. She has also contended that both the courts below have grossly erred in proceeding on the basis that the plaintiffs were daughters of the deceased Bhagubhai Kalabhai and Jivanbhai Kalabhai respectively. Infact, the plaintiff no. 2 is the widow of the deceased Jivanbhai Kalabhai and was entitled to a share in the Hindu joint family property even under the Nibandh. She has further contended that the plaintiffs had also claimed that the plaintiffs had a share in the Hindu joint family property according to the custom and usage prevailing in their community. The custom and usage could not have been proved unless proper issue were framed and the plaintiffs were allowed to lead evidence. The court, therefore, has erred in not framing the issue as regards the custom and usage prevailing in their community and in not permitting the plaintiffs to lead evidence to establish such custom and usage. In support of her arguments, she has relied upon the judgments of this court in the matters of GUJARAT HOUSING BOARD VARODA VS NAVNIRMAN MAZDOOR BANDHKAM SAHKARI MANDLI LTD (1992 {1} GLR 155), and of STATE OF GUJARAT VS M/S JAIPALSINGH JASWANTSINGH

ENGINEERS & CONTRACTORS CHANDIGARH (1994 {1} GLR 258, and of Patna High Court in the matter of GOPAL SINGH BHUMIJ VS GIRIBALA BHUMIJ (AIR 1991 PATNA 138)

Mr. Patel has submitted that the plaintiffs clearly spelt out that the plaintiff no. 1 is the daughter of Bhagubhai Kalabhai and the plaintiff no. 2 is the daughter of Jivanbhai Kalabhai; that the plaintiffs had claimed right to share in the suit properties under the Act of 1956; the question of any custom prevailing in the subject matter, therefore, should not arise. If at all there were any custom prevailing, the same stood superseded by the Nibandh, which govern the parties to the suit. The provisions contained in Nibandh expressly kept the daughters out of right to a share in the joint family properties. Both the courts below were, therefore, right in holding that the parties to the suit were governed by the Nibandh, and that the plaintiffs had no right to inherit the joint family property.

In the matter of Gujarat Housing Board (supra), considering the provisions contained in Order 14 Rule-2 of the CP Code, the court held that - " While dealing with application for raising a preliminary issue, the averments contained in the plaint as a whole should be taken into consideration. Besides, it appears from the averments contained in the plaint that the issue of limitation is dependent upon the fact to be established and in that case, certainly the issue of limitation also would be a question of law as well as fact. If that is so, the issue of limitation in the facts and circumstances of the case before the trial court, could not have been ordered to be raised as a preliminary issue. " In the matter of M/s Jaipalsingh Ishvarsingh (supra), this court has held that - " In fact there are cases and cases and particularly, the cases wherein either the facts are not disputed by either side or that the point involved centers round some interpretation of pure question of law without any necessity to call in aid some factual evidence in support of the same, the court can certainly decide the same on the bare pleadings and the arguments made in support of the same. .... when facts are in dispute the trial court in the first instance is bound to frame the issues of facts and/or of law (as the case may be) as warranted under Order XLV Rule 1 of the Civil Procedure Code, 1908. " In the matter of Gopal Singh (supra), the court, on fact found that the plaintiffs had failed to prove that they had become sufficiently Hindu so that in the matter of inheritance and succession prima-facie can be governed by

Hindu Law. The said decision shall lend no assistance to the court in respect of the matter at issue.

Ms. Brahmbhatt is not right in contending that the question whether the Act applies to the plaintiffs or not, is a mixed question of facts and law. The plaintiffs have admitted in the plaint that the plaintiffs belong to Hindu Dhodiya community. The same being an admitted fact, the question of the plaintiffs' proving otherwise does not arise. The question whether the plaintiffs were governed by the Act of 1956 or not is, therefore, a pure question of law and the courts below are right in holding that the same can be decided as a preliminary issue. Sub-section (1) of section 2 of the Act, interalia, provides that the said Act shall apply to any person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj. Sub-section (2) thereof provides that " Notwithstanding anything contained in sub-section (1) nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of the Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs." Both the courts below have extensively dealt with the issue. It has been held that Dhodiya community in the State of Gujarat is included in the Constitution (Schedule Tribe) Order, 1950. Thus, the said Tribe being a Schedule Tribe is expressly excluded from the applicability of the Act. The plaintiffs' claim for a share in the joint Hindu family property under the Act of 1956 has rightly been rejected.

Both the courts below have found that the suit properties are situated within the area of erstwhile State of Baroda and the parties to the suit are governed by the Nibandh as was prevailing in the State of Baroda. The Division Bench of this Court (Coram : B.J.Divan & V.R.Shah JJ - as they were then} in its decision in the matter of BAI VASUMATI VS JAYANTILAL NATHALAL SHAH (Letters Patent Appeal No. 9/63, decided on 11th November, 1968) has held that Even after enactment of Hindu Law and the Hindu Marriage Act, Baroda Hindu Nibandh, 1937, had not been repealed, and in view of section 5 of the Bombay Merged States (Laws) Act, 1950, read with Vth Schedule thereto continues in force in the territory of the former State of Baroda as if it had been enacted by the Bombay State Legislature until that Act was altered, repealed or amended by the Bombay Legislature or any other competent authority. The Nibandh was enacted to consolidate various laws governing

the Hindus which were prevalent in the former State of Baroda. The said Nibandh was made applicable, interalia, to all Hindus either by birth or by conversion. Section 3 thereof provides that nothing in the said Nibandh shall apply to the customs then prevalent in any family, community or region in respect of the matters except the matters included in Appendix-1 to the Nibandh. Chapter-2 thereof relates to the Hindu undivided family. Section 8 thereof enumerates the persons who can be the co-parceners in the joint family property. Such persons include (a) male descendants for three generations from a common ancestor; (b) male descendants for three generations from the male descendant of the concerned Branch after the death of such common ancestor; and (c) the widow of a male co-parcener on either the death of such male co-parcener or on such male co-parcener's renouncing the world. Appendix-1 to the said Nibandh refers to several matters, but does not refer to the matter as regards the Hindu joint family. Hence, it is apparent that under the Nibandh, the daughters are excluded from inheritance and a share in the joint family property.

Ms. Brahmbhatt has strenuously urged that both the courts below have erred in proceeding on the basis that both the plaintiffs were the daughters claiming right to a share in the joint family property. She has submitted that the plaintiff no. 2 is the widow of Jivanbhai Kalabhai and under the Nibandh, she has a right to share in the joint family property since the death of her husband Jivanbhai Kalabhai. Since the said fact has been disputed by the defendants, the trial court ought to have framed an issue as regards whether the plaintiff no.2 is the widow of late Jivanbhai Kalabhai or not. This being a pure question of fact, the trial court could not have decided the matter on preliminary issue alone. This contention is also not sustainable. Though the plaintiff no.2 Shantiben has been described as the widow of late Jivanbhai Kalabhai in the cause-title of the suit, in the body of the plaint in paragraph-2 , it has been categorically mentioned that late Jivanbhai Kalabhai was the uncle of the plaintiff no. 1 and, had died intestate on 12th July, 1979; his wife Premiben Jivanbhai had pre-deceased him and that the defendants nos. 9 and 10 were the sons of late Jivanbhai Kalabhai, and the plaintiff and the defendants nos. 11 and 12 were the daughters of late Jivanbhai Kalabhai. Hence, it is an admitted fact that Premiben-wife of late Jivanbhai Kalabhai had pre-deceased him and that the plaintiff no.2 is the daughter of late Jivan Kala. In that view of the matter, the courts below can not be said to have erred in

holding that neither of the plaintiffs had a right to inheritance or a right to a share in the joint family property under the Nibandh.

This brings me to the last question whether the courts below have erred in dismissing the suit on the preliminary issue alone, and in not permitting the plaintiffs to establish their claim to a share in the joint family property pursuant to the custom or usage prevailing in their community.

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As recorded hereinabove, , the plaintiffs had claimed a right to a share in the joint family property under the Act of 1956 as well as under the Nibandh and also under the custom and usage prevalent in their community. As discussed hereinabove, the Act does not apply to the parties to the suit and under the Nibandh, the daughters are not conferred right to a share in the joint family property. Both the plaintiffs being the daughters of the family of Kalabhai Patel, have no right to a share in the joint family property under the Nibandh. However, as discussed hereinabove, section 3 of the Nibandh expressly excludes the applicability of the Nibandh in respect of the custom and usage prevailing in a particular family, community or a region. In other words, in case of a custom prevailing in a family, community or region contrary to the provisions made in the Nibandh, the custom should prevail. Hence, irrespective of the provisions of the Nibandh, the plaintiffs can still claim a right to a share in the joint family property under the prevailing custom and usage. The custom and usage can be established by leading evidence alone. Both the courts below have unfortunately not noticed the alternative claim putforth by the plaintiffs under the custom and usage prevalent in their community. Neither an issue has been framed in that regard, nor any evidence has been permitted to be led in that respect. The appeal, therefore, shall have to be allowed to that extent.

Appeal is partly allowed. The judgments and orders of both the courts below are confirmed as regards the applicability of the Hindu Succession Act, 1956 and the plaintiffs' right under the Baroda Hindu Nibandh, 1937. However, the matter is remanded to the trial court for framing an appropriate issue as regards whether the

plaintiffs have a right to a share in the suit properties under the custom and usage prevailing in their community and a decision thereon. The parties shall be at liberty to lead evidence on this issue. The parties may approach the trial court for expeditious hearing of the suit and for interim injunction. The parties shall bear their own costs. The status-quo as regards the suit properties ordered to be maintained by this court under its order dated 29th July, 1994, shall stand extended till 1st January, 2001. The Registry will return the R&P forthwith.

(MS R.M.DOSHIT J)

JOSHI